



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Order 96-3-36

SERVED MAR 22 1996

Issued by the Department of Transportation
on the **15th day of March, 1996**

**LOS ANGELES-GUADALAJARA EXEMPTION
PROCEEDING**

Docket OST-95-244

Application of

UNITED AIR LINES, INC.

Docket OST-95-431

for a certificate of public convenience and necessity
pursuant to 49 U.S.C. 41101 (Los Angeles-Guadalajara)

ORDER

Summary

By this order, we grant the petition of United Air Lines, Inc., for reconsideration of Order 95-8-3, in ~~the~~ *Los Angeles-Guadalajara Exemption Proceeding* and, on review, affirm our decision to grant the application of American Airlines, Inc., to operate Los Angeles-Guadalajara services. We also dismiss without prejudice the application of United, filed in Docket OST-95-431, for certificate authority to serve the Los Angeles-Guadalajara market.

Background

By Order 95-6-27, we tentatively selected United over American to provide scheduled combination service in the Los Angeles-Guadalajara market. Both United and American had proposed nonstop Los Angeles-Guadalajara service three times daily with similarly-sized aircraft and, thus, we concluded that they offered comparable services to the local market. However, we concluded that United's proposal offered superior online connecting service to/from Guadalajara via Los Angeles, and could develop more feed to support the market than could American.

Pleadings filed in response to the tentative decision, however, raised questions regarding the applicants' commitments to institute the services proposed¹. Accordingly, the Department requested that both

¹ See American's objection to Order 95-6-27 (July 3, 1995); United's answer to American's objection (July 10, 1995); and American's reply to United's answer (July 11, 1995).

applicants file updated information on their respective plans for implementation of services in the Los Angeles-Guadalajara market.²

American provided updated information in support of its commitment to provide three daily nonstop roundtrips in the Los Angeles-Guadalajara market in August 1995³. In contrast, United modified its proposal, stating that it would commence two daily nonstop roundtrips in the market beginning October 1, 1995, adding the third nonstop flight in June 1996.

After careful examination of all of the information received from the applicants, we decided to reverse our tentative decision and to grant the application of American over that of United (Order 95-8-3). In taking such action, we stated that we had reviewed the merits of the applicants' proposals in light of United's revised service proposal, and determined that American would now provide the most significant public benefits in this case.

Petition for Reconsideration

On August 21, 1995, United filed a petition for reconsideration of Order 95-8-3. United requests that, on reconsideration, the Department grant the application of United for an exemption to operate scheduled nonstop combination service in the Los Angeles-Guadalajara market and deny the application of American.

United argues that the Department abandoned virtually all of the factual determinations that it had announced in its show-cause order, which has led to an anticompetitive result. United states that American has used capacity as a predatory device to block entry of a competitor, and that the Department has allowed itself to be "stampeded" into a bidding contest at the

² Department Notice dated July 12, 1995.

³ American stated that it would start service on August 16, 1995, with one daily roundtrip, and would increase that service to three daily roundtrips on August 31, 1995.

⁴ United also filed a petition for review with the U.S. Court of Appeals for the District of Columbia Circuit. The court dismissed the petition, but told United it could file for *mandamus* if the Department unreasonably delayed action on its petition for reconsideration. United Air Lines, Inc. v. Department of Transportation, No. 95-1428 (D.C. Cir. Jan. 19, 1996) (order dismissing petition for review).

⁵ United states that American, having built up an "unassailable competitive position at the premiere gateway to Latin America, Miami," now seems intent on blocking intergateway competition at the two secondary points of entry to Latin America, Texas and California. (Petition at 2.)

expense of due process and marketplace competition.⁶ United further argues that this case was never close between the applicants--that United was tentatively chosen based on findings of United's "overwhelming superiority," and that, indeed, there was no selection criterion on which American's proposal was deemed superior to United's.

United also argues that the Department never suggested that speed of entry was a decisional consideration in this case "having allowed five months to pass since the Los Angeles-Guadalajara designation became available before issuing the tentative decision."⁷ United argues that, in this regard, the Department "was barred from altering, without advance notice and explanation, the selection criteria after it had reached a decision which was based on the longer term market structure criteria reflected in its order to show cause." United maintains that, when the Department delayed its tentative decision until after the summer peak had "largely passed," United reverted to its original start-up interval "to reflect the timing of the award and the onset of the winter season."

Finally, United urges the Department to undertake immediately an investigation of the longer-term needs of the market in a certificate proceeding where the selection criteria will be spelled out in advance.⁸ United states, further, that it should be allowed to serve the market pendente lite, and that, regardless of which carrier the Department decides to choose in the short term, it should make the award subject to termination upon the conclusion of a final decision in the requested certificate proceeding.

Responsive Pleadings

American filed an answer stating that United's petition is completely without merit and should be denied. American contends that United has grossly mischaracterized the proceeding and fails to provide any basis for the Department to disturb American's award.

American states that it inaugurated Los Angeles-Guadalajara service on August 16, 1995, as it committed to do, with one daily nonstop roundtrip flight, and that the second and third daily flights will be added August 31, 1995.⁹ American maintains that United lost this case because of its own "deliberate and extraordinary decision to recant its service proposal."¹⁰

American further argues that by virtue of the Department's Notice of July 12, 1995, seeking the applicants' service implementation commitments, United was given an "extraordinary opportunity for a second bite at the apple," and was on explicit notice that the applicants' start-up and schedule commitments would constitute a decisive carrier-selection factor. American argues that United, instead, responded by deferring any service at all until October 1, 1995, and delaying its full service pattern until June 1, 1996, some nine months into a two-year award.

⁶ United also states that American's amended service proposal of February 10, 1995 (where American proposed to increase from two to three its daily service in the market), was procedurally defective because American did not seek and was not granted leave to amend its application after responsive pleadings had been submitted. In this regard, United cites 14 CFR 302.5 which provides that an application may be amended after answers have been filed only if leave is granted by the Department. United requests that the Department address this issue to clarify its policy with respect to such amendments in future exemption proceedings.

⁷ United also argues that American's accelerated start date constitutes an unauthorized amendment to its application, coming after the Department's tentative decision.

⁸ In this regard, on August 21, 1995, United filed a certificate application, in Docket OST-95-431, for Los Angeles-Guadalajara authority, and asks that the case be set for oral evidentiary hearing before an Administrative Law Judge (ALJ).

⁹ American added the second and third flights on August 31.

¹⁰ American states that United amended its service proposal on July 10, 1995, without seeking leave to do so under 14 CFR 302.5.

American also states that, throughout this proceeding the Department, United, and American all presumed that the Los Angeles-Guadalajara award would be for two years. Only now, American argues, does United seek a pendente lite award and a certificate proceeding before an Administrative Law Judge. American argues that, to convert this case to pendente lite case after American has inaugurated service in reliance on a two-year award, would be fundamentally unfair and a violation of American's due process rights, and that United has presented no basis for the Department now to place American's authority at issue in a certificate proceeding.

On September 18, 1995, United supplemented its petition for reconsideration of Order 95-8-3.¹¹ In its supplement, United argues that, after American argued that there is a Guadalajara traffic peak in the winter as well as the summer, and less than one month after American implemented its Los Angeles-Guadalajara service, American announced a reduction in its Guadalajara service from double daily to daily service in the Dallas/Ft. Worth-Guadalajara market. United argues that American's "seasonal adjustment in service to Guadalajara mirrors that which United itself proposed..." United argues that, as a result of American's reduction of service in the Dallas/Ft. Worth-Guadalajara market, the Department can no longer conclude that there is any net gain to U.S. carrier competition in the U.S.-Guadalajara market. The total of four daily flights operated by American to Guadalajara during the off peak period will now equal the two daily off peak frequencies United proposed from Los Angeles plus the two daily frequencies which American was offering from Dallas/Ft. Worth. Thus, service levels will now equal those proposed by United, but the traveling public will not benefit from intergateway competition that would have been present with United in the Los Angeles-Guadalajara market, and that American can reduce competition at its whim. United states further that its decision to defer inauguration of the third daily nonstop flight in the market until the summer peak was based on historical traffic seasonality and the overall drop in demand for service in the present recession, which has "been validated by American's marketplace actions," to reduce service in the Dallas/Ft. Worth-Guadalajara market.

On September 27, 1995, American filed a response to United's supplement.¹² American states that it is not reducing its Dallas/Ft. Worth-Guadalajara service. American explains that, on September 15, 1995, prior to the date United filed its supplement, American determined that its Dallas/Ft. Worth service to Guadalajara would remain at two daily roundtrips. American states that reinstatement of the second frequency in the market was based on American's ongoing review of its winter schedules, and will appear in SABRE (American's computer reservation system (CRS)) on September 27, 1995. American states that, accordingly, it will continue to operate a total of five daily roundtrip flights between the United States and Guadalajara.

On September 29, 1995, United filed a reply to American's September 27 response.¹³ United argues that, if United had not revealed American's plans to reduce its Guadalajara service, those plans would have been implemented. United urges the Department to act quickly to reconsider its action consistent with United's pending petition for reconsideration of Order 95-8-3.

Decision

We have decided to grant United's petition for reconsideration of Order 95-8-3 and, on reconsideration, to affirm our decision to grant American's exemption application for Los Angeles-Guadalajara authority and to deny United's exemption application for Los Angeles-Guadalajara authority. We have also decided to

¹¹ United accompanied its supplement with a motion for leave to file in order to place into the record newly discovered evidence to support its petition. We will grant the motion.

¹² American accompanied its response with a motion for leave to file an otherwise unauthorized document. We will grant the motion.

¹³ United accompanied its reply with a motion for leave to file an otherwise unauthorized document. We will grant the motion.

dismiss without prejudice United's application, filed in Docket OST-95-431, for a certificate of public convenience and necessity to serve the Los Angeles-Guadalajara market.

Our tentative decision, in Order 95-8-3, to select United over American reflected the applicants' service proposals and other evidence of record before us at that time. The record changed significantly, however, subsequent to the issuance of our tentative decision. The updated record presented a case where the two applicants no longer offered the same level of service. While American remained committed to prompt inauguration of three-times daily service in the Los Angeles-Guadalajara market, United would not begin service in the market until October 1, 1995, and would not implement three-times daily service until June 1996. United's significantly-downsized service proposal materially altered the relative benefits each applicant would provide in the market. Under these circumstances, we found that United's advantages did not overcome American's superior service proposal.¹⁴ We concluded, and affirm here, that American would now provide the most significant public benefits in this case. United has not demonstrated error in that conclusion or that it should be selected in preference to American.

There is no merit in United's argument that it has been denied due process in this case. We provided all applicants in this case the maximum opportunity to compete for an award in this proceeding, including the opportunity to amend their proposals to reflect their current positions. The record shows that United amended its application twice prior to the issuance of our tentative decision, and that we relied on those amendments in initially selecting it for the authority at issue.¹⁵ In these circumstances, United was not prejudiced by amendments filed by American before United's amendments. Moreover, all applicants were on notice that our primary objective was to choose an airline that would provide the most public benefits and that their service proposals were central to a decision on that issue. See Order 95-6-27 and the Department's Notice, dated July 12, 1995. In this regard, we relied on the same carrier selection criteria in both the tentative and the final decision. In both instances, we selected the applicant that would provide the most significant service and competitive benefits in the market during the two-year term of the award. The critical difference between our first and second opinions was United's decision to downgrade its service proposal and, therefore, to provide fewer service and competitive benefits than American.

United has provided no evidence to support its contention that American's proposal should be disregarded because American has allegedly used capacity as a predatory device to block United's entry and intergateway competition. The facts are that both applicants initially offered to provide the same level of Los Angeles-Guadalajara service; that we found both proposals to be credible; and that American is now providing the level of service that it proposed in this case. Moreover, we never relied on inter-gateway competition as a basis for tentatively selecting United or viewed inter-gateway competition as a significant factor in this proceeding. We concluded then, as now, that the principle public benefits that accrued from each applicant's proposal involved other factors. In this regard, we note that United's arguments regarding the competitive implications of purported changes in American's Dallas-Guadalajara service are based on the erroneous assumption that American reduced service in that market after we decided this case.

¹⁴ We also found that United's decision to modify its service proposal reduced the level of beyond area benefits it could provide in the market.

¹⁵ On February 7, United amended its proposal stating that it was "prepared to start its nonstop service to Guadalajara on May 1 1995, the same date proposed by American," and, on February 14, 1995, United further amended its proposal to include three daily flights in the market. We relied on United's amendments tentatively to select it for the route authority at issue. In these circumstances, it was not prejudiced by our earlier decision to accept American's amended service proposal. To the extent that we did not grant either applicant leave to file otherwise unauthorized documents, we will do so now.

To the extent that United's certificate application in Docket OST-95-431 and its pleadings in this docket would have us relitigate, on ~~apendente~~ lite basis, the two-year award to American made in Order 95-8-3, we find such procedures unwarranted and inappropriate. We never intended that this proceeding would result in a short-term exemption award pending an early award of certificate authority. To the extent that United urges the immediate institution of a proceeding to consider the needs of the market beyond the two-year term of American's exemption authority, its request is premature. We will, therefore, dismiss its application in Docket OST-95-431 without prejudice. If we receive a more timely application(s) for certificate authority to serve the route for the period after the term of American's exemption authority will have expired, we will determine appropriate procedural steps at that time.¹⁶

ACCORDINGLY,

1. We grant the petition of United Air Lines, Inc., for reconsideration of Order 95-8-3 and, upon reconsideration, affirm our decision in that order;
2. We grant the September 18, 1995, motion of United Air Lines, Inc., for leave to file an otherwise unauthorized document to supplement its petition with newly-discovered evidence;
3. We grant the September 27, 1995, motion of American Airlines, Inc., for leave to file an otherwise unauthorized document in response to the United supplement of September 18, 1995;
4. We grant the September 29, 1995, motion of United Air Lines, Inc., for leave to file an otherwise unauthorized document in response to American's September 27, 1995, pleading;
5. We grant American Airlines, Inc., and United Air Lines, Inc., leave to file all other unauthorized documents in this proceeding;
6. To the extent not granted or dismissed, we deny all other requests in ~~the~~ *Los Angeles-Guadalajara Exemption Proceeding*(Docket OST-95-244);
7. We dismiss without prejudice the application of United Air Lines, Inc., in Docket OST-95-431, for certificate authority to serve the Los Angeles-Guadalajara market;
8. We may amend, modify, or revoke this order at any time without hearing; and
9. We will serve a copy of this order on Alaska Airlines, Inc.; American Airlines, Inc.; Delta Air Lines, Inc.; United Air Lines, Inc.; the Ambassador of Mexico in Washington,

¹⁶ In this regard, we also note that American's authority is subject to the dormancy notice conditions consistently applied to U.S.-Mexico route authority (see Condition #7, of Appendix A, of Order 88-10-2). Therefore, should the route become dormant, United may apply for authority to serve the market at that time.

D.C.; the Department of State (Office of Aviation Negotiations); and the Federal Aviation Administration.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this order is available on the World Wide Web at
<http://www.dot.gov/dotinfo/general/orders/aviation.htm>*